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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF WESTCHESTER COUNTY, STATE OF NEW YORK

CRIBARI, SCAPOLITO & SOLINGER,
Counsel for Petitioners,
100 Stevens Avenue,
Mount Vernon, New York.

GEORGE W. SCAPOLITO,
WALTER B. SOLINGER II
Of Counsel.

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IN THE

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FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF WESTCHESTER COUNTY, STATE OF NEW YORK

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STAES:

Your petitioners, Floyd Dinan, Milton Poplees, Frank Castelucci, Frank Poplees, a/k/a Frank Day and Albert Bricker, respectfully represent the following:

A

Summary statement of matter involved.

Petitioners Floyd Dinan, Milton Poplees, Frank Castellucci and Albert Bricker were indicted by the Grand Jury

of Westchester County for several alleged violations of Section 974 and 986 of the Penal Law (bookmaking) and the said petitioners, together with petitioner Frank Day, were, in addition, indicted for Violation of Section 580 of the Penal Law, to wit, conspiring to violate Sections 974 and 986.

Petitioners moved the County Court of Westchester County, Hon. Hugh S. Coyle, County Judge, for an inspection of the Grand Jury minutes or in the alternative for examination of said minutes by the Court and for dismissal of the indictments.

The record in the case shows and the prosecution conceded that all the evidence presented to the Grand Jury and used to obtain the indictments was based upon recordings obtained pursuant to "wire-tap" orders issued under Section 813-A of the New York Code of Criminal Procedure.

The County Court, on the authority of *Benanti* v. *United States*, 355 U. S. 96, dismissed the indictments (15 Misc. 2d 211). (See opinion of County Court, Appendix.)

An appeal was taken by the People from the dismissal of the indictments to the Appellate Division of the Supreme Court of the State of New York, Second Department, which on December 22, 1958 (7 A. D. 2d 119) unanimously "reversed on the law" the order of the County Court. (See opinion of Appellate Division, Appendix.)

An appeal was thereafter taken by permission of Hon. Charles W. Froessel, Associate Judge of the Court of Appeals, to the Court of Appeals of the State of New York, which on April 9th, 1959, unanimously affirmed the order of the Appellate Division, without opinion.

B

Grounds upon which the jurisdiction of this Court is invoked.

Petitioners respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 of Title 28, U.S.C. and Rule 19 of the Revised Rules of the Supreme Court of the United States.

The Court of Appeals of the State of New York, has decided a federal question of substance in a way "probably not in accord with applicable decisions of this Court" (Rule 19 of the Revised Rules of the Supreme Court).

The judgment and order of the Court of Appeals of the State of New York was dated and entered April 9, 1959; the order of the County Court of Westchester County, New York, making the judgment and order of the Court of Appeals the judgment and order of the County Court was dated and entered April 29, 1959. (See Appendix.)

C

Question presented for review.

(a) Whether due regard for the federal-state relationship presently requires this Court to sanction a so-called state rule of evidence admitting illegally obtained wire tap evidence on a criminal trial in view of this Court's holding in *Benanti* v. *United States* (355 U. S. 96), that the Federal Communications Act covers the field and admits of no state action therein.

(b) Whether the Court of Appeals of the State of New York erred in denying the comprehensive supremacy of the Federal Communications Act in violation of Article

VI of the Constitution of the United States, thus denying petitioners a right claimed under a Statute of the United States.

D

Summary of facts.

There is no question of fact involved. It is conceded that the indictments are based on recordings of intercepted telephone communications. (*People* v. *Dinan*, 7 A. D. 2d 119.)

E

The statutes and constitutional provisions involved in the case.

The Federal Communications Act, so far as relevant, provides (U.S.C. title 47, Sec. 605):

Unauthorized publication or use of communications:

"* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person, * * *"

United States Constitution, Article VI:

"All debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding; * * *"

F

Reasons relied upon for the allowance of the writ.

The Federal Communications Act was first adopted by Congress in 1934, which said Act was designed to regulate communication by wire or radio.

Following upon the adoption of the Act, this Court, over the years, has had before it a series of cases calling for interpretation, the general effect of which has been to extend the scope of the prohibition against interception and/or divulgence.

In *Nardone* v. *United States* (1937), 302 U. S. 379, this Court held that the provisions of § 605 applied to federal officers and that the prohibition against "divulgence" forbade divulgence by giving evidence of intercepted communications in a federal court.

This decision was soon followed by *Nardone* v. *United States*, 308 U. S. 338, wherein this Court held that not only are the communications themselves to be excluded, but likewise information obtained as a result of the illegal wiretap.

In 1939, in *Weiss* v. *United States*, 308 U. S. 321, this Court determined that intrastate messages intercepted by wire tapping are protected from disclosure equally with interstate communications.

It is obvious that these decisions have followed an evolving pattern, the effect of which has been to continuously extend the scope of the prohibition contained in § 605 of the Federal Communications Act.

The latest pronouncement on the subject is *Benanti* v. *United States*, 355 U. S. 96, decided in 1957.

In the *Benanti* case, respondent urged that the interception and divulgence of a telephone conversation obtained

as the result of wire tapping by New York State enforcement officers pursuant to § 813-a of the Code of Criminal Procedure, without participation by federal authorities, was admissible in a federal prosecution. On the argument respondent did not question the constitutional right of Congress to forbid wire tapping in the face of conflicting State Law, but argued instead that Congress had not exercised this power and that § 605 being general in its terms should not be deemed to operate to prevent a State from authorizing wire tapping in the exercise of its legitimate police function. This argument was answered by the Court as follows:

> "However, we read the Federal Communications Act, and § 605 in part, to the contrary.
>
> The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under § 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. Weiss v. U. S., supra. The natural result of respondent's argument is that both interstate and intrastate communications would be removed from the statute's protection because * * * the interceptor cannot discern between the two and will listen to both. Congress did not intend to place the protection so plainly guaranteed in § 605 in such a vulnerable position. Respondent points to the portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these matters dealing with aspects of the regulation of utility service to the public, are technical in nature in contrast to the broader policy considerations motivating § 605. Moreover, the very existence of these grants of authority to the states underscores the conclusion that had Congress intended to allow the states to make exceptions to § 605, it would have said

so. In the light of the above considerations, and keeping in mind this comprehensive scheme of interstate reguation and the public policy underlying § 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow State legislation which would contradict that section and that policy (citing cases)."

Doubts that may have existed prior to the *Benanti* case as to the scope of the prohibition contained in § 605 were finally dissipated by the *Benanti* holding. The prohibition of § 605 is complete and absolute and allows of no contrary state enactments or policy.

It is urged that notwithstanding the criminal sanction of § 605, the wire tap evidence herein is admissible in New York State because a state rule of evidence is involved, and that the decided cases permit evidence, illegally obtained, to be introduced. In support of this argument, we are referred to *Schwartz* v. *Texas*, 344 U. S. 199. That case was decided in 1952 some five years before the decision in the *Benanti* case and several years before the decision in the school integration cases. In the *Schwartz* case, the Supreme Court held that a Texas statute which forbade the introduction of evidence obtained in contravention or violation of the Constitution of the United States did not prohibit a divulgence in the State Court of a communication intercepted in violation of § 605 of the Federal Communications Act. In the *Benanti* case, the Supreme Court, in commenting on *Schwartz* v. *Texas*, wrote:

"The rationale of that case (Schwartz v. Texas) is that despite the plain prohibition of § 605, due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."

It is submitted that in the *Benanti* case this Court, in effect anticipating the situation presented in the case at

bar, indicated that the federal-state relationship was due for review and reexamination. That relationship was reexamined by this Court in the school integration cases which upset this court's own decisions of some fifty years standing. What may have been valid in that relationship in 1952 when the *Schwartz* case was decided, cannot now be considered valid in the light of the shifting values of that relationship presaged by the decision in the school integration cases.

It is respectfully submitted that cases such as *Schwartz* v. *Texas* and *People* v. *Saperstein*, 2 N. Y. 2d 210 (decided in January 1957 almost a year before the *Benanti* decision), have no value as authority today, but are of only historical interest. The logic of the decision in the *Benanti* case clearly is that in the face of an absolute prohibition in a federal statute against the interception and divulgence of wire communications, which federal statute permits of no contrary state statute, there can be no divulgence of said wire-tap evidence in either a state or a federal court.

Previous decisions permitting such divulgence in state courts were based on the premise that the Federal Communications Act was not meant to cover the field but allowed state action. That was the fundamental premise of the *Schwartz* case. Mr. Justice Minton argued in his opinion that Congress had not clearly manifested an intention to preempt the field nor to establish a prohibition in plain terms proscribing any state action that would contradict the federal statute and federal policy. This premise having been swept away by the *Benanti* decision, the whole argument that illegallly obtained wire tap evidence is admissible in state courts must fall.

In the cases at bar each of the crimes charged are misdemeanors. The criminal sanctions of the Federal Communications Act make divulgence a crime punishable by both fine and imprisonment. The law would fall into dis-

repute in short order should it sanction one offense to establish another one. The law is reason and where reason flies out the window, the law flies with it. Nor is morality served by sanctioning a crime to achieve convictions. That way lies the road to a police state.

It is manifest that the Federal Communications Act is a substantive enactment conferring upon the participants to a telephone conversation the privilege of security and the right to have their conversations remain inviolate and confidential except upon their express consent.

The Federal Communications Act was enacted pursuant to the Commerce Clause of the Constitution and as such it is a law enacted pursuant to the Constitution. By virtue of Article VI of the Constitution it is the supreme law of the land binding on the judges in every state.

It follows that the rights and privileges personal to these petitioners and conferred by the Federal Communications Act cannot be denied or ignored by the Courts of the State of New York.

It further follows that the conversation and recordings obtained in violation of Section 605 cannot be admitted into evidence except upon the consent of these petitioners.

Petitioners respectfully submit that the foregoing petition is a good and sufficient reason for allowing the writ of certiorari in the case at bar.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Court to the County Court of Westchester County, State of New York, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the record and all proceedings had herein, as heretofore remitted to the said County Court of Westchester by the Court of Appeals of the State of New York; and that the order of

the Court of Appeals of the State of New York affirming the order and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Department, be reversed, and that the petitioners may have such other relief as this Court may deem appropriate.

Dated, July 2, 1959.

FLOYD DINAN
MILTON POPLEES
FRANK CASTELUCCI
FRANK POPLEES a/k/a FRANK DAY
ALBERT BRICKER

Petitioners

By CRIBARI, SCAPOLITO & SOLINGER,
Counsel for Petitioners

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

WALTER B. SOLINGER, II
Counsel for Petitioners

Appendix A

SUPREME COURT,

APPELATE DIVISION—SECOND JUDICIAL DEPARTMENT.

Wensel, Acting P. J., Belcock, Ughetta, Mallinan and Kleinfeld, JJ.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

FRANK DINAN,
Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

MILTON POPLÆES,
Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

FRANK CASTELLUCCI,
Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

FRANK POPLEES, also known as FRANK DAY,
Respondent.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

ALBERT BRICKER,
Respondent.

Appendix A.

Appeal from an order of the County Court of Westchester County (Hugh S. Coyle, J.), entered February 13, 1958 dismissing indictments.

Joseph P. Gagliardi, District Attorney (Leonard Rubenfeld, Arthur V. Praete and Warren J. Schneider of counsel), for appellant.

George W. Scapolito and Walter B. Solinger, II, for respondents.

Frank S. Hogan (Richard G. Denzer and H. Richard Uviller of counsel) for New York State District Attorneys' Association, *amicus curiae*.

WENZEL, Acting P. J.

The question for determination is whether the decision of the Supreme Court of the United States in *Benanti* v. *United States* (355 U. S. 96, decided December 9, 1957), requires or impels reversal of the rule of evidence which has been settled by the Court of Appeals of this State, namely, that evidence procured as a result of telephone wire tapping is admissible in an action or proceeding in the courts of this State. In the instant case it is conceded that the indictments of the respondents, variously for violation of statutes prohibiting gambling and conspiracy, were based on recordings of intercepted telephone communications, and it is undisputed that the evidence was thus obtained in pursuance of court orders made under section 813-a of the Code of Criminal Procedure. If the evidence was inadmissible, the order of the County Court should be affirmed. If the evidence was admissible, the order should be reversed and the motion to dismiss the indictments should be denied.

Prior to the decision in the *Benanti* case (*supra*), the Supreme Court of the United States had held that, in view of section 605 of the Federal Communications Act (U. S.

Code, tit. 47, § 605), which forbids interception of a telephone communication and divulgence thereof (§ 501 of that Act makes violation of § 605 a crime) evidence procured by or as a result of such means may not be used to secure a conviction of crime in a Federal Court (*Nardone* v. *United States*, 302 U. S. 379, 308 U. S. 338), but in no case had the Supreme Court undertaken to rule that any State must conform its rules of evidence to the rule thus established for Federal courts. State courts may adopt rules of evidence which are contrary to those adopted by Federal courts, so long as no violation of the Federal Constitution is involved (see *Stein* v. *New York*, 346 U. S. 156, 187-188; *People* v. *Spano*, 4 N. Y. 2d 256, 261) and, as a matter of fact, the Supreme Court in *Schwartz* v. *Texas* (344 U. S. 199), wherein a conviction in a State court, based on wire tap evidence procured at the direction of State officers, was under review, affirmed the conviction, expressly stating that section 605 applied only to exclude wire tap evidence in Federal court proceedings and that the section "does not apply to exclude such evidence in state court proceedings" (p. 203).

In 1946, when the Court of Appeals first dealt with the question of whether wire tap evidence ought to be admitted in a proceeding in our courts in view of section 605, it did not overlook the consideration that section 605 was a substantive law forbidding disclosure or divulgence of evidence procured by wire tapping or the fact that the Supreme Court of the United States had ruled such evidence inadmissible in Federal court proceedings (*Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15). Thereafter, in 1952, the Supreme Court commented that the very introduction into evidence of wire tap evidence would itself be a violation of section 605, and that this is a factor for a state to consider in formulating a rule of evidence for use in its own courts (*Schwartz* v. *Texas*, *supra*, p. 201).

However, in the most recent case before the Court of Appeals on the subject, the court expressly answered that by stating that the rule of this State that the evidence is admissible is not affected by the circumstance that requiring a witness to testify as to wire taps might force him to a criminal violation of the Federal Communications Act. (*People* v. *Saperstein*, 2 N. Y. 2d 219, 215 [1957], cert. denied *sub nom. Saperstein* v. *New York*, 353 U. S. 946.) Thus, the conclusion is inescapable that the Court of Appeals positively rejected the suggestion that the New York rule of evidence be changed.

Nothing in the *Benanti* case (355 U. S. 96, *supra*), can be viewed as casting doubt upon the firmness of the rule in New York as enunciated by the Court of Appeals. Under review in that case was a conviction in a Federal court, and the Supreme Court decided that, since the case was in a Federal court, the Federal rule was applicable despite the fact that the wire tapping had been done by New York police and pursuant to a New York court order made under section 813-a of the Code of Criminal Procedure. It is true that the Supreme Court in that case held that the Congress, in enacting the Federal Communications Act (U. S. Code, tit. 47, § 151, *et seq.*), and particularly section 605 thereof, intended to set forth a comprehensive scheme for the regulation of interstate communication which precludes validity to a State statute that would even under certain circumstances permit wire tapping (Code Crim. Pro., § 813-a). The holding might justify a New York court in refusing to grant an application for an order under section 813-a (see *Matter of Interception of Tel. Coms.*, 9 Misc. 2d 121). However, it must not be forgotten that the Court of Appeals, in formulating and adhering to the New York rule, did so, as we have seen, with realization that the very introduction of evidence of this nature would itself constitute the commission

of a crime, one with the ostensible sanction of the trial court. Under the circumstances, the rule enunciated by the Court of Appeals should be followed. If indeed a judicial change of the rule ought to be considered, argument should be addressed to the Court of Appeals in an appropriate appeal.

The very question which is presently before us, that is, whether the *Benanti* case (355 U. S. 96, *supra*), requires a change in a State rule of evidence, has been passed upon by the Supreme Court of Pennsylvania, and that court has come to the same conclusion we reach in the instant case. In that State, the rule of evidence prior to the *Benanti* case (*supra*), was the same as in New York, the Supreme Court of that State having held, on the authority of the *Schwartz* case (344 U. S. 199, *supra*), that wire tap evidence was admissible in its State courts despite section 605 of the Federal Communications Act (*Commonwealth* v. *Chaitt*, 380 Pa. 532). Thereafter, the *Benanti* case (*supra*), was decided, but the same court refused to change the Pennsylvania rule even after considering that case (*Commonwealth* v. *Voci*, —— Pa. ——, 143 A. 2d 652). We might note parenthetically that, after the trial and conviction in the *Voci* case, the Pennsylvania Legislature changed the rule of that State by statute (15 P. S. § 2443).

The order should be reversed on the law and the motion to dismiss the indictments should be denied.

Appendix B

Opinion.

COUNTY COURT,

WESTCHESTER COUNTY.

HON. HUGH S. COYLE, COUNTY JUDGE

THE PEOPLE OF THE STATE OF NEW YORK,

against

FLOYD DINAN, MILTON POPLEES, FRANK CASTELLUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Defendants.

Defendants Floyd Dinan, Milton Poplees, Frank Castellucci and Albert Bricker were indicted by the Grand Jury of Westchester County for several alleged violations of Section 974 and 986 of the Penal Law of the State of New York (bookmaking). The above named defendants and defendant Frank Poplees, also known as Frank Day, were, in addition, indicted for violation of Section 580 of the Penal Law (conspiracy to violate said statute): All of the above charges are misdemeanors.

Defendants move for inspection of the Grand Jury minutes or in the alternative for examination of said minutes by the Court and for dismissal of the indictments. The present motion is made on the authority of the recent decision of the United States Supreme Court in Benanti v. U. S., decided December 9, 1957; New York Law Journal, January 16, 1958, Page 1, Col. 1. The court there held that evidence obtained by State officials under a State statute

was barred by Section 605 of the Federal Communications Act in a prosecution in a Federal Court.

The record in the case here shows and the prosecution concedes that the evidence presented to the Grand Jury and used to obtain the indictments was based upon recordings obtained pursuant to "wire tap" orders issued under Section 813-A of the Code of Criminal Procedure.

The question presented is a serious one which has a real and substantial bearing upon procedures to be followed in the future by law enforcement officers and agencies in investigation of and the prosecution for violations of our Penal Laws.

Over the years the methods and practices of criminal procedure have been developing in a pattern to supply greater protection to the rights and liberties of individuals accused of crime. Intermittently there have been serious retrogressions and abuses of the rights of those accused of crime, but that the general philosophy in the administration of criminal law in favor of greater protection of the rights of the accused is plainly manifest.

In the determination of the Benanti case the court construed Section 605 of the Federal Communication Act, the pertinent portion of which was quoted as follows:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."

Our highest court in the Benanti case discussed its own decisions in the two Nardone cases, 302 U. S. 379, and 308 U. S. 338, and in Schwartz v. Texas, 344 U. S. 199 and observed that the Benanti case containing elements of the three above cases; "* * * forces a choice between the different results reached." The Court then chose to rest

its decision squarely on Section 605 of the Federal Communications Act and the public policy underlying it, and not on Constitutional grounds.

There are numerous decisions in our Court of Appeals on the question of the right to receive evidence obtained under "wiretap" statutes and that Court has consistently and repeatedly upheld State Legislation and law enforcement officers operating thereunder in the administration of the criminal law.

The Schwartz case referred to above more closely resembles the case here under consideration in that, there, as here, a State law was being followed by State enforcement officers. The real question presented is as to the effect of the Benanti decision by the United States Supreme Court on its own holding in the Schwartz case.

Unfortunately from a fair reading of the decision in the Benanti case that degree of clarity which would be conclusive is not found. In the decision in the Benanti case the United States Supreme Court did state that it was not dealing with a mere "rule of evidence", but rather with a Federal Statute which is,

> "• • • a prohibition in plain terms which does not mean to allow State Legislation which would contradict Section 605 of the Federal Communications Act, and the policy underlying the legislation."

Some point has been made that our own Court of Appeals decisions have not been considered in certiorari by the United States Supreme Court, and were thus affirmed. This occurred prior to the decision in the Benanti case. In this connection, it is of interest to note that in the case of People v. Stemmer, 298 N. Y. 728, where the precise question here being considered was presented, the United States Supreme Court refused certiorari by an equally divided court, 334 U. S. 963.

Appendix B.

The Grand Jury minutes have been reviewed and the conduct of a lengthy trial at this time does not seem to be indicated. All the facts and circumstances establish the conclusion that the weighty questions here presented should be promptly passed upon by our appellate court. The motion to dismiss the indictments is granted.

Submit order on notice.

Dated: White Plains, N. Y., February 6, 1958.

HUGH S. COYLE,
County Judge of Westchester County.

Appendix C

No. 66

THE PEOPLE & CO.,

Respondent,

v.

FLOYD DINAN & ORS.,

Appellants.

BE IT REMEMBERED, That on the 20th day of February in the year of our Lord one thousand nine hundred and fifty-nine, Floyd Dinan, & ors., the appellants in this cause, came here unto the Court of Appeals, by Cribari, Scapolito & Solinger, their attorneys, and filed in the said Court of Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People & c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Joseph F. Gagliardi, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Walter B. Solinger, II, of counsel for the appellant—, and by Mr. Leonard Rubenfeld, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. And it was further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court,

Westchester County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid. And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 9, 1959.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANON,
Clerk.

Appendix D

At a Term of the County Court of Westchester County held at the Court House in the City of White Plains, N. Y., this 29th day of April 1959.

Present: Honorable Hugh S. Coyle, County Judge.

The People of the State of New York

against

Floyd Dinan, Milton Poplees, Frank Castellucci, Frank Poplees a/k/a Frank Day and Albert Bricker,

Defendants.

The defendants having heretofore appealed to the Court of Appeals from an order of the Supreme Court, Appellate Division, Second Department, dated December 22, 1958, which unanimously reversed the order of the County Court of Westchester County made February 11, 1958 and entered in the Office of the Clerk of Westchester County on February 13, 1958 dismissing the indictments against the above named defendants, and the Court of Appeals having heard said cause and after due deliberation having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be unanimously affirmed, and said Court of Appeals having remitted the record and proceedings herein to this Court to be proceeded upon according to law, as appears from the certified copy of the remittitur dated April 9, 1959 and filed in the Office of the Clerk of said Court on the same date.

Appendix D.

Now on reading and filing the certified copy of the remittitur of the Court of Appeals dated April 9, 1959 and on motion of Joseph F. Gagliardi, District Attorney of Westchester County, Leonard Rubenfeld, Assistant District Attorney of Counsel, it is hereby

ORDERED that the judgment and order of the Court of Appeals of the State of New York be and the same is hereby made the judgment and order of this Court, and it is further

ORDERED that the order of this Court made February 11, 1958 dismissing the indictments herein be and the same hereby is reversed, and the motion to dismiss said indictments against the above named defendants be and the same hereby is in all respects denied, and it is further

ORDERED that the indictments against the above named defendants be and the same hereby are reinstated and restored to the trial calendar of this Court, to be proceeded upon according to law.

Enter,

HUGH S. COYLE,
County Judge.

LE COPY

Office-Supreme Court, U.S.
FILED
AUG 5 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the County Court of Westchester County, State of New York

BRIEF OF RESPONDENT IN OPPOSITION

JOSEPH F. GAGLIARDI,
District Attorney of Westchester County,
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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the County Court of Westchester County, State of New York

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BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the County Court of Westchester County (App. B of Petition) is reported at 15 Misc. 2d 11. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department (App. A of Petition) is reported at 7 A. D. 2d 119. The decision of the Court of Appeals and the order of the County Court of Westchester County incorporating the remittitur of the New York Court of Appeals are printed in the Petition at App. C and D respectively.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Does Section 605 of the Federal Communications Act render inadmissible evidence obtained as the result of wire tapping by state law enforcement officers pursuant to Section 813-a of the New York State Code of Criminal Procedure in a state tribunal?

Statute Involved

The pertinent provision of the Federal Communications Act (47 U.S.C. § 605) is set forth in the Petition at page 4.

Statement

The Petition at pages 1 and 2 adequately sets forth the history of litigation.

Argument

The alleged issue presented in the Petition has been unequivocally settled and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

Schwartz v. *Texas*, 344 U. S. 199, held that wire tap evidence is admissible in a state court where it has been obtained by state agents.

Despite the protestations of petitioners, *Schwartz* v. *Texas* is a living, vibrant decision and very much the law of the land today. Mr. Justice Minton who delivered the

opinion of the Court, very pointedly remarked that (p. 202):

> "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly . . ."

The recent decision of the Supreme Court on this subject, *Benanti* v. *United States*, 355 U. S. 96, not only did not relegate the *Schwartz* decision to the archives as of only historical interest, but has strengthened the rationale of that decision as a bulwark against transgression of state sovereignty. Mr. Chief Justice Warren in setting forth the basis of the Court's holding in the *Schwartz* case, stated in part in the opinion of the Court in the *Benanti* case at page 101:

> "The rationale of that case is that despite the plain prohibition of Section 605, due regard to federal state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect."

If there was any doubt as to whether *Schwartz* v. *Texas* remained in full force and effect after the *Benanti* decision, this was completely dispelled by footnote 19 (p. 106) appearing at the end of the Court's dissertation concerning the Federal Communications Act as a comprehensive scheme for the regulation of interstate communication:

> "[19] Schwartz v. Texas, supra, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated § 605. 344 U. S., at 202."

This Court has construed Section 605 of the Federal Communications Act as rendering inadmissible in a Court of the United States, communications intercepted and sought to be divulged in violation thereof. *Nardone* v. *United States*, 302 U. S. 379. The second *Nardone* decision[1] extended this rule of evidence in United States Courts so as to render equally inadmissible the fruit of the poisonous tree, and by *Weiss* v. *United States*, 308 U. S. 321, telephone calls, purely intrastate in character, were included in the exclusionary rule.

The reversal of the judgment in the *Benanti* case (*supra*) is merely a logical extension of the rationale of the *Nardone* decisions. Were this not the fact, then the exclusionary rule of evidence in Federal Courts could be circumvented by the mere use of illegally intercepted communications obtained by state law enforcement agencies under an unwritten gentleman's agreement.

It must be conceded that Section 605 of the Federal Communications Act makes the interception and divulgance of telephone communications an illegal act. The Supreme Court of the United States in the exercise of its supervisory power over the Federal Court system, has extended the rule to prevent the use of evidence obtained in violation of Section 605 to sustain a federal conviction —no matter who the agent.

Even if such evidence be deemed illegally obtained analogous to evidence obtained in violation of the Fourth Amendment, the strongest federal mandate derived from the Constitution itself does not require state rules of evidence to conform to the federal exclusionary rule. *Wolf* v. *Colorado*, 338 U. S. 25, while clearly enunciating the application to the states of the Fourth Amendment to the Federal Constitution concerning search and seizure, nevertheless did not compel them to adopt the federal rule excluding evidence obtained thereby. And the uniform rule

[1] 308 U. S. 338.

in New York to the contrary has gone undisturbed by the United States Supreme Court. *People* v. *Defore*, 242 N. Y. 13, Cert. denied 270 U. S. 657; *People* v. *Adams*, 176 N. Y. 351, Affirmed 192 U. S. 585.

Moreover, the New York State Courts have repeatedly taken into consideration the anomalous situation presented by the *Benanti* decision. *People* v. *Saperstein*, 2 N. Y. 2d 210, Cert. denied 353 U. S. 946, and more recently in *People* v. *Variano*, 5 N. Y. 2d 391, 185 N.Y.S. 2d 1.

Thus the police power of the States remains undisturbed with respect to the rules of evidence in state tribunals.

Hence, petitioners' argument that the Federal Communications Act by virtue of Article 6 of the Constitution of the United States is the supreme law of the land and therefore binding on the judges in every state is fallacious. Both the Supreme Court of the United States and the Court of Appeals of the State of New York have recognized the prohibition contained in the Federal Communications Act. The Supreme Court has, through its supervisory powers over the Federal Court system, prevented federal conviction by evidence obtained in violation thereof, but has not extended this exclusionary rule of evidence to state law enforcement agents in state tribunals and no valid reason is presented here why this rule should be altered.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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LEONARD RUBENFELD,
Assistant District Attorneys,
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No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF WESTCHESTER COUNTY, STATE OF NEW YORK.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The respondent's brief in opposition to the petition herein has taken the position that the decision of this court in *Benanti* v. *U. S.*, 355 U. S. 96, had no effect on the pre-existing non-exclusionary rule of evidence in New York State, and the argument is advanced that the issue presented has been unequivocally settled.

On the other hand, it was argued in petitioners' application for a writ that by virtue of the decision in *Benanti*, the Federal-State relationship was due for review and

re-examination, and that this court should grant a Writ of Certiorari to resolve confusion and disagreement as to the scope and effect of the Federal Communications Act insofar as the same affects the exclusionary rule of evidence prevailing in the State of New York.

Illustrative of the confusion which the *Benanti* decision has engendered, is a recent opinion by the Court of Appeals of the State of New York which has been published since the submission of the petition herein. The case is *People* v. *Broady*, 5 N. Y. 2nd, 500. The majority opinion in the said case professes to find that the *Benanti* case did not rule that a State legislature could not pass parallel legislation in the field of intrastate communications. On the other hand, Judge Fuld, in a dissenting opinion, frankly expressed bewilderment as to the scope and intent of the rule in the *Benanti* case. We quote from the opinion of Judge Fuld:

> "The Supreme Court declared in the Benanti case that the Federal Communications Act is 'a comprehensive scheme' (355 U. S. 96, 78 S. Ct. 159) for the regulation of both interstate and intrastate communications and, in addition, intimated that Congress, by enacting that statute, 'and Section 605 in particular,' has exercised its power to forbid wire tapping and prevent a State from authorizing wire tapping even in the exercise of its legitimate police functions. Benanti v. United States, 355 U. S. 96, 104, 78 S. Ct. 155. Such language, particularly when considered in light of the authorities cited (355 U. S. at page 106, 78 S. Ct. 155)—such as Pennsylvania v. Nelson, 350 U. S. 497, 76 S. Ct. 477, and Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed 1782—gives me pause as to the correctness of the present holding that the Federal Government has not fully occupied the field of telephonic communications, including, of course, their interception. And, if Congress 'has taken the particular subject-matter in hand' (Charleston & W.

Car. R. R. v. Varnville Furniture Co., 237 U. S. 597, 604, 35 S. Ct. 715, 59 L. Ed. 1137), it matters not, contrary to the intimations contained in the court's opinion, 350 U. S. at pages 509, 512, 76 S. Ct. at pages 483-485, whether the State legislation is in conflict with the Federal law or supplements it. See, e.g., Pennsylvania v. Nelson, 350 U. S. 497, 504, 76 S. Ct. 477, supra; Southern Ry. Co. v. Railroad Comm., 236 U. S. 439, 448, 35 S. Ct. 304, 59 L. Ed. 661; Erie R. R. Co. v. New York, 233 U. S. 671, 683, 34 S. Ct. 756, 58 L. Ed. 1149, reversing 198 N. Y. 369, 381, 91 N. E. 849, 853, 29 L.R.A., N. S., 240. Nevertheless, *until the Supreme Court has spoken more decisively on the subject*, I hesitate to say that Congress has, through Section 605, pre-empted the field so as to supersede and render ineffectual the provisions of this State's Constitution and Code of Criminal Procedure which authorize wire tapping (N. Y. Const., art. 1, § 12; Code Crim. Proc., § 813-a)." (Emphasis supplied.)

It is respectfully submitted that in the interests of clarification, this court should grant the petition for a Writ of Certiorari herein to the end that the Federal-State relationship on the question presented may be resolved.

Dated: September 29, 1959.

Respectfully submitted,

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